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Walt Disney World Co. and United Food and Commercial Workers Union, Local 1625. Case 12–CA–025889

March 19, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On June 2, 2009, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed answering briefs to the Respondent's exceptions, and the Respondent filed a brief in reply to each answering brief. In addition, the General Counsel filed cross-exceptions and a supporting brief. The Charging Party joined the General Counsel's cross-exceptions, and the Respondent filed an answering brief to the General Counsel's exceptions. The General Counsel filed a brief in reply to the Respondent's answering brief.

The National Labor Relations Board has considered the decision in light of the exceptions and briefs, and has decided to adopt the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order.²

I. INTRODUCTION

This case involves allegations of unfair labor practices stemming from the Respondent's reorganization of its catering department during the term of its collective-bargaining agreement with the Union. The judge con-

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We shall modify the judge's conclusions of law, and substitute a new remedy, order, and notice to conform to the violations found. In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), we shall modify the judge's remedy by requiring that any monetary awards shall be paid with interest compounded on a daily basis. In addition, in accordance with our recent decision in *Latino Express, Inc.*, 359 NLRB No. 44 (2012), we shall order the Respondent to compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee. We shall also modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010).

cluded that the Respondent violated Section 8(a)(5) and (1) by eliminating several job classifications in the catering department and reassigning the work previously performed by employees in those classifications to other employees. We agree with the judge's conclusion that the Respondent's conduct was unlawful, but for reasons that differ from those provided by the judge, as explained in detail below.³

II. FACTUAL BACKGROUND

The Respondent, Walt Disney World, is the well-known entertainment complex in Florida comprising theme parks, resort hotels, and other properties. UFCW Local 1625 (the Union), which represents the Respondent's catering department employees, is a member of Service Trades Council Union (STCU), an association of six labor organizations. STCU and the Respondent were parties to a master agreement—effective from April 29, 2007 to October 2, 2010—that covered employees in various departments throughout the Respondent's organization. The agreement was supplemented by addenda that addressed the specific terms and conditions of employment of the various classifications of employees represented by the individual unions comprising the STCU. Addendum A set forth the employee classifications that were covered by the master agreement, including those catering department employees represented by the Union: housemen, servers, bartenders, bar captains, and banquet captains, among others.⁴ Addendum B-5 addressed the terms and conditions of employment of catering department employees.

³ We adopt the judge's conclusions that the Respondent violated Sec. 8(a)(5) and (1) by failing to provide to the Union relevant requested information and, contrary to the Respondent's contention, that deferral to the parties' grievance-arbitration procedure is not appropriate here. The Board has long maintained a policy of refusing to defer information disputes to arbitration. See, e.g., *Chrysler, LLC*, 355 NLRB 307, 307 fn. 2 (2010); *Team Clean, Inc.*, 348 NLRB 1231, 1231 fn. 1 (2006); *Shaw's Supermarkets*, 339 NLRB 871 (2003). In addition, Board precedent provides that "when . . . an allegation for which deferral is sought is inextricably related to other complaint allegations that are either inappropriate for deferral or for which deferral is not sought, a party's request for deferral must be denied." *American Commercial Lines*, 291 NLRB 1066, 1069 (1988). See also *Arvinmeritor, Inc.*, 340 NLRB 1035, 1035 fn. 1 (2003). Here, the information-request allegations are inextricably linked to the 8(a)(5) allegations asserting an unlawful change in the scope of the unit and unlawful midterm contract modifications. Those allegations are premised on the Respondent's restructuring of its catering department, and the information dispute involves documents and other information pertaining to the Respondent's restructuring decision. Under these circumstances, deferral is not appropriate.

⁴ This nomenclature, used by the parties and the judge and therefore followed here, is not identical to that used in Addendum A of the parties' collective-bargaining agreement.

In 2006, the Respondent became concerned about a decline in its guest satisfaction ratings. In December of that year, the Respondent's director of catering and convention services, Ann Williams, met with the Respondent's senior managers to discuss the issue. Then, in 2007, Williams spearheaded a pilot program at the Respondent's Yacht and Beach Club designed to improve the Respondent's guest satisfaction ratings. A key aspect of the pilot program was an increase in managerial presence; the Respondent increased the amount of time that its nonbargaining unit guest service managers (GSMs) spent on the work floor, from 50–60 percent to more than 90 percent. As Williams confirmed at the hearing, however, the program “did not have any effect on the responsibilities of bargaining unit employees.”

In October 2007, following the conclusion of the pilot program, Williams presented to the Respondent's senior managers the “WDW Catering Operations Disney Service Basics Proposal.” In that document, Williams stated that the program enabled the Respondent “to execute many of our assumptions and changes we are proposing in structure, responsibilities, productivity, Cast engagement and Guest satisfaction. The results were very favorable and compelled us to fast forward our business plan.” Williams further stated that, notwithstanding various efforts to raise service levels, it had become increasingly difficult to improve guest service to optimal levels and therefore that “more aggressive measures [were] warranted.”⁵ Accordingly, Williams proposed that the Respondent eliminate the captain and bartender bargaining unit positions and increase the number of nonbargaining unit banquet guest service manager (BGSM) positions; she also proposed redefining the role of the BGSMs by assigning to them the duties previously performed by captains, and by increasing their presence on the work floor. At the hearing, Williams testified that the objectives of this restructuring proposal were to minimize the duplication of work and to provide more support to the Respondent's guests and employees. Further, Williams testified, the Respondent anticipated that the increased managerial presence would more readily

allow for resolution of employee disputes on the floor, thereby reducing the likelihood of grievances.

Williams presented a revised restructuring proposal to the Respondent's senior managers in January 2008. Although more concise than the October 2007 proposal, the objectives and proposed changes set forth in the document were essentially unchanged. The January 2008 document appears to embody the final proposal on which the Respondent later relied in implementing the reorganization at issue here.

On the morning of May 5, 2008,⁶ the Respondent's manager of labor relations, Jerry Vincent, orally informed the Union that it “was going to move forward with some reorganization” of the catering department, and would be eliminating the banquet captain, bar captain, and bartender classifications. Vincent told Union Representative Julie Jerkovich that the Respondent would be open to effects bargaining, but Jerkovich responded that she did not believe that the Respondent had the right to take the action that it proposed and did not agree that the Respondent's obligation was limited to effects bargaining. Later that afternoon, Director of Catering and Convention Services Williams held a meeting with employees. She informed the bar and banquet captains that their positions were being eliminated, and that they could transfer to server positions, place themselves in the general labor pool (Casting) for any available position, or apply for positions as BGSMs.⁷ Williams informed the bartenders that their positions were being eliminated and that they would be reassigned as servers.

Thereafter, the Union continued to protest the Respondent's actions, asserting that the Respondent had no authority to remove bargaining unit work. The Respondent, for its part, continued to assert its right to reorganize the catering department and to reiterate its offer to bargain over the effects of the reorganization. By July 6, the Respondent had eliminated the captain and bartender positions at all of its facilities. The duties previously performed by the captains were performed by nonunit BGSMs, and the tasks previously performed by the bartenders at the resort properties were performed by servers.⁸

The Union filed unfair labor practices charges in June, and filed amended charges 2 months later. The General Counsel issued the initial complaint in this proceeding in

⁵ The executive summary of the proposal stated that GSM ratings for courtesy and responsiveness to guests had declined in each of the three preceding years and that “[i]mproving guest service to optimal levels has become increasingly difficult due to the turbulent relationship between the Company, select hourly Cast Members and union representatives.” Expounding upon the latter point, Williams opined in the summary that an unreasonable amount of leadership time and company resources were being used to address “frivolous grievances,” that work was routinely interrupted to address guest service and employee issues, and that some hourly employees were intentionally disrupting or sabotaging daily operations.

⁶ All subsequent dates are in 2008 unless otherwise noted.

⁷ A key component of the Respondent's reorganization was the creation of 24 extra-unit BGSM positions.

⁸ Prior to the reorganization, employees occupying the bartender classification worked only at the resort hotels. In the theme parks, bartending duties were performed by servers who had been specifically trained to perform that work.

October, alleging in relevant part that the Respondent unlawfully (1) altered the scope of the bargaining unit and failed to continue in effect the terms of the collective-bargaining agreement by unilaterally eliminating the captain position and transferring that work to nonunit managers without the Union's consent, and (2) eliminated the bartender position and transferred work to other unit employees without the Union's consent, thereby failing to continue in effect the terms of the parties' contract. The complaint also alleged that the Respondent refused to provide requested relevant information to the Union. In the alternative to the allegation that the Respondent unlawfully altered the scope of the unit by eliminating the captain position, the complaint alleged that the Respondent unlawfully transferred the captains' unit work, a mandatory subject of bargaining, to nonunit employees without providing the Union with notice or an opportunity to bargain regarding the transfer or its effects.

In February 2009, the General Counsel filed an amended complaint withdrawing the alternative allegation. It specifically alleged that the elimination of the captain and bartender positions, and the transfer of the work previously performed by employees in those positions, violated Section 8(d) of the Act. In a subsequent amended complaint, the General Counsel specified that the Respondent's refusal to furnish information constituted a failure to bargain in violation of Section 8(a)(5) and (1).⁹

III. JUDGE'S DECISION

The judge found that the Respondent unlawfully altered the scope of the bargaining unit when it eliminated the banquet captain, bar captain, and bartender positions without the Union's consent. In addition, the judge found that the Respondent violated the Act by failing to provide notice to, and bargain with, the Union regarding its decision to eliminate those positions and reassign the work previously performed by employees in those positions. In so finding, the judge rejected the Respondent's contention that its reorganization of the catering department constituted an entrepreneurial decision involving a change in the scope or direction of the enterprise under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), such that the Respondent was privileged to act without the Union's consent. The judge also rejected the Respondent's contention that contractual language, including a management-rights clause, constituted a

"clear and unmistakable waiver" of the Union's right to bargain.

The judge additionally concluded that the Respondent, by eliminating the captain and bartender positions, rendered inoperative various contractual provisions relating to those employee classifications, including the designated wage rates, scheduling priority based on seniority, separate gratuity pools (and the gratuity distribution percentage), and the provision establishing that employees who worked in more than one classification per day were to be paid at the higher rate for the time worked in that classification. As a result, the judge found that those changes constituted unlawful midterm contract modifications in violation of Section 8(a)(5) and (1).

Finally, the judge found that the Respondent unlawfully failed and refused to furnish requested relevant information concerning its decision to eliminate the captain and bartender classifications and to reassign the work. In so finding, the judge rejected the Respondent's contentions that its obligation was limited to effects bargaining and that the requested information was not relevant for that purpose.

IV. DISCUSSION

Our analysis begins by focusing on the precise allegations of the amended complaint. First, although the judge concluded that the Respondent violated Section 8(a)(5) and (1) by failing to provide notice to, and bargain with, the Union regarding its decision to eliminate the captain and bartender positions and reassign the work previously performed by employees in those positions, the amended complaint does not allege such a violation. As stated above, the General Counsel expressly withdrew that allegation prior to the opening of the hearing. Moreover, consistent with that action, counsel for the General Counsel—during the hearing and following the Respondent's presentation of its case—disavowed such a theory:

I just want to make sure it goes on the record, and it is already in the Complaint, that General Counsel is arguing that this is an 8(d) violation and also a change in scope[,] and so the [General Counsel's] position would be [that the Union] can't [be] required to bargain at all.

...

Earlier we had some argument that [there was] a waiver of the union's right to demand bargaining or to bargain over a decision.

...

I am stating the response to that. I just want to make it clear . . . that in the Complaint, this is alleged as an 8(d)

⁹ At the hearing, the General Counsel orally amended the complaint to correct the dates of the Respondent's alleged elimination of the captain and bartender positions.

violation and as an alteration in the scope of the unit, and that those things are not bargainable. The union has no obligation to bargain

The General Counsel has specifically cross-expected to the judge's conclusion that the Respondent violated the Act by failing to give notice to and bargain with the Union regarding the decision to eliminate the captain and bartender positions and reassign their work. Consistent with the position that he expressed at the hearing, the General Counsel asserts in his brief: "Respondent could not lawfully eliminate the banquet captains and bartenders without the Union's consent, regardless of whether or not it gave the Union notice and an opportunity to bargain over the issue."

The foregoing facts establish that the General Counsel expressly disavowed a unilateral change theory and instead chose to proceed solely on the theory of a midterm contract modification (and, with respect to the elimination of the captain positions, a change in the scope of the unit, as discussed below). Therefore, we find merit in the General Counsel's cross-exception and modify the judge's Order and notice accordingly.

Second, the judge concluded that the Respondent's elimination of *both* the captain and bartender classifications and reassignment of the work previously performed by employees in those classifications constituted an unlawful unilateral alteration of the scope of the bargaining unit without the Union's consent. However, as discussed above, and as the General Counsel confirms in his answering brief, the allegation that the Respondent unlawfully altered the scope of the bargaining unit pertained only to the elimination of the *captain* position and the transfer of the former captains' duties to nonunit managers. The judge erred in stating that the allegation encompassed the Respondent's elimination of the *bartender* position and transfer of the former bartenders' duties to servers within the bargaining unit. Rather, with respect to the bartenders and their duties, the complaint solely alleges a midterm modification of the parties' collective-bargaining agreement, in violation of Section 8(d). Because the legal principles applicable to a change-of-unit-scope allegation differ from those applicable to a midterm contract modification, we analyze the two allegations, involving the captains and the bartenders, separately.

A. The Respondent's Elimination of the Banquet and Beverage Captain Positions and the Reassignment of Work to Nonunit Managers was an Alteration of the Scope of the Unit

"It is well established that 'once a specific job has been included within the scope of a bargaining unit by

either Board action or consent of the parties, the employer cannot unilaterally remove or modify that [position] without first securing the consent of the union or the Board.'" *Wackenhut Corp.*, 345 NLRB 850, 852 (2005) (quoting *Hill-Rom Co. v. NLRB*, 957 F.2d 454, 457 (7th Cir. 1992)). Accord: *Holy Cross Hospital*, 319 NLRB 1361, 1361 fn. 2 (1995). See also *Centurylink*, 358 NLRB No. 134, slip op. at 1 (2012). The recognition clause of the collective-bargaining agreement in effect at the time of the Respondent's elimination of the captain positions provided, in pertinent part, that the Respondent recognized the STCU as the exclusive representative of all of its full-time employees in the classifications listed in Addendum A of the collective-bargaining agreement. Addendum A specifically included, among other positions, bartenders, bar captains, and banquet captains. In addition, article 12 of the collective-bargaining agreement provided: "The job classifications and rates of pay which shall prevail during the term of this Agreement are set forth and contained in 'Addendum A.'" Because the contract established that the captain positions were included within the scope of the bargaining unit, the Respondent could not eliminate those positions from the unit without the prior consent of the Union. See *Wackenhut*, supra at 852.

The Respondent nevertheless contends that it was privileged to reorganize the catering department, including the elimination of the captain position, without the Union's consent because the reorganization constituted an entrepreneurial change relating to the "scope or direction of the enterprise" within the meaning of *First National Maintenance Corp. v. NLRB*, 452 U.S. 666. According to the Respondent, the reorganization involved a major shift in the manner in which it related to its customers, and the BGSMs' assumption of the captains' duties reduced inefficiencies and increased accountability. In addition, the Respondent asserts that its objective in restructuring the catering department was to improve guest service ratings (and, ultimately, profitability), and emphasizes that labor costs were not a factor in the decision.

In our view, the judge properly concluded that *Geiger Ready Mix Co.*, 315 NLRB 1021 (1994), enfd. in relevant part 87 F.3d 1363 (D.C. Cir. 1996), and *Torrington Industries*, 307 NLRB 809 (1992), are controlling here, rather than *First National Maintenance*.¹⁰ See also

¹⁰ As we conclude that the Respondent's reorganization of its catering department does not constitute an entrepreneurial change within the meaning of *First National Maintenance*, we need not address the applicability of *First National Maintenance* to potential situations in which an employer undertakes truly entrepreneurial changes that result in the alteration of an established bargaining unit.

O.G.S. Technologies, Inc., 356 NLRB No. 92 (2011). In those decisions, the Board held that when an employer changes only the identity of the employees performing the former unit work, while maintaining substantially the same operations or production processes, the employer's decision does not constitute a change in the scope or direction of the enterprise, but is a mandatory subject of bargaining under *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964). Here, as the judge noted, the Respondent did not eliminate the work previously performed by the captains; the same work continued to be performed by other employees. Meanwhile, the Respondent offered the same catering services to its guests in the same locations, using the same equipment. Thus, consistent with the principles articulated in *Geiger Ready Mix* and *Torrington*, we find that the Respondent's elimination of the captain positions did not constitute a change in the scope or direction of the enterprise implicating *First National Maintenance*.¹¹ Accord: *O.G.S.*, supra, slip op. at 5 (change in process for how work was completed constituted "a change by degree, not kind," and therefore did not constitute an entrepreneurial change implicating *First National Maintenance*) (internal quotation omitted).

The Respondent additionally contends, in effect, that the Union gave prior consent to the Respondent's reorganization of the catering department by virtue of language contained in the collective-bargaining agreement.¹² Specifically, the Respondent cites two provisions of the applicable collective-bargaining agreement: Addendum B-5 and article 5. Addendum B-5 contained a "Staffing Guidelines" provision setting forth suggested staffing ratios for bartenders, and states: "Management

reserves the right to staff functions as deemed appropriate." According to the Respondent, that provision constituted a specific grant of authority allowing it to make all staffing decisions unilaterally. Article 5 of the agreement was a management rights clause, which provided in relevant part:

Except as expressly and clearly limited by the terms of this Agreement, the Company reserves and retains exclusively all of its normal and inherent rights with respect to the Management of the business, including but not limited to, its right to select and direct the number of employees assigned to any particular classification of work; to subcontract work, to establish and change work schedules and assignments.

The Respondent asserts that the management-rights provision granted it the right to select the number of employees—including zero—assigned to a particular classification of work.

Looking first at the reservation-of-rights language in Addendum B-5, we find that it does not establish the Union's consent to the elimination of unit classifications. The plain language of the clause itself indicates that the Respondent's authority pertained to the staffing levels for catering functions; the clause made no mention of the *elimination* of classifications. Indeed, the Respondent's former catering operations director, John Stafford, conceded that he understood this reservation-of-rights language to grant the Respondent the authority to determine which positions to use at a particular function, but not the authority to eliminate any position.¹³

Next, we find that the management rights clause in article 5 does not establish that the Union consented to the elimination of unit classifications. Rather, as the judge

¹¹ In support of its position, the Respondent relies principally on the Third Circuit's decision in *Furniture Rentors of America, Inc. v. NLRB*, 36 F.3d 1240 (3d Cir. 1994). There, the court criticized the *Torrington* Board for finding that the employer had a duty to bargain about a subcontracting decision without first considering whether the matter was amenable to resolution in collective bargaining. The District of Columbia Circuit observed in a subsequent decision that the Third Circuit's decision in *Furniture Rentors* was a response to an unusual set of facts. See *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300 (D.C. Cir. 2003). In *Regal Cinemas*, the court stated—in our view, correctly—that transfer-of-work decisions will nearly always be amenable for resolution within the collective-bargaining framework, and that the subcontracting in *Furniture Rentors*—a decision based on the employer's concerns about employee theft—represents the exception, rather than the rule. *Id.* at 311 fn. 7.

¹² Although the Respondent (as well as the judge) characterizes the issue as one of waiver, a change in the scope of a bargaining unit requires the union's *consent*. Thus, we consider whether the contractual language suffices to establish such consent.

Because waiver is not the issue, we need not address the Respondent's additional contention that the Board should abandon the "clear and unmistakable" waiver standard and, instead, adopt the "contract coverage" approach endorsed by several courts of appeals.

¹³ The Respondent claims that its argument is supported by the parties' bargaining history. Specifically, the "Staffing Guidelines" section of the prior (2004–2007) collective-bargaining agreement contained staffing guideline matrices for the server and captain positions, with a notation providing that "the parties recognize that the numbers represent a guideline and may fluctuate from event to event." The Respondent contends that the elimination of those matrices in the current collective-bargaining agreement, together with the addition of the reservation-of-rights language, evinces the intent to afford the Respondent complete discretion in the staffing of the position.

We reject this argument. Explaining the difference between the two collective-bargaining agreements, the Respondent's former manager of labor relations and chief negotiator for the addendum agreements, Jerry Vincent, testified that the Respondent had been concerned that the matrices and language in the prior contract could be interpreted as a guarantee for a particular level of staffing at catered events. Thus, the removal of the captain and server matrices and addition of the reservation-of-rights language was simply intended to confirm the Respondent's discretion to staff the functions with the number of employees that it deemed appropriate.

reasoned, in granting the Respondent the authority to select and direct the number of employees assigned to a particular classification of work, the management rights provision necessarily assumed the continued existence of those employee classifications. Further, as set forth above, article 12 of the collective-bargaining agreement provided: “The job classifications and rates of pay which shall prevail during the term of this Agreement are set forth and contained in ‘Addendum A.’” Addendum A, in turn, specifically included, among other positions, bartenders, bar captains, and banquet captains. Finally, the judge properly concluded that *Gratiot Community Hospital v. NLRB*, 51 F.3d 1255 (6th Cir. 1995), cited by the Respondent, is inapposite, as it does not reflect Board precedent, and it did not involve the elimination of contractually established job classifications.

For all these reasons, we conclude that the Respondent violated the Act by altering the scope of the unit without the Union’s consent.¹⁴

B. The Respondent’s Elimination of the Banquet and Beverage Captain and Bartender Classifications were Midterm Contract Modifications and Thereby Violated Section 8(d)

It is well established that Section 8(a)(5) and (1) and Section 8(d) of the Act prohibit an employer party to an existing collective-bargaining agreement from modifying the terms and conditions set forth in that agreement without the consent of the union. See *Bath Iron Works Corp.*, 345 NLRB 499, 502 (2005), *affd. sub nom. Bath Marine Draftsmen’s Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007). Accord *Nick Robilotto, Inc.*, 292 NLRB 1279 (1989). As demonstrated, the Union did not consent to the elimination of the captain positions, and the same analysis of Addendum B-5 and Article 5 refutes the Respondent’s position that the Union consented to the elimination of the bartender classification.

The Board applies the “sound arguable basis” standard to determine whether a particular midterm unilateral change constitutes an unlawful contract modification within the meaning of Section 8(d). See *Hospital San Carlos Borromeo*, 355 NLRB 153 (2010); *Bath Iron Works*, *supra* at 502. Under that standard, the Board will

not find a violation of the Act if, in making the change, the employer relied in good faith on a sound and arguable interpretation of the contract. *Bath Iron Works*, *supra* at 502.

As discussed above, the provisions of the applicable collective-bargaining agreement specifically identified captains and bartenders as classifications that “shall prevail” during its term. The Respondent’s elimination of those positions therefore modified the contract. The Respondent contends, however, that its alteration of the contract did not constitute an unlawful midterm modification within the meaning of Section 8(d) because it had a sound arguable basis for interpreting the contract as ceding to it the authority to eliminate the positions. In so contending, the Respondent again relies on the same contract language (i.e., the “staffing guidelines” provision in Addendum B-5 and the management-rights clause), bargaining history, and past practice that it cited in support of its waiver defense, which we have discussed and rejected above.¹⁵

As discussed, the “staffing guidelines” provision in Addendum B-5 to the collective-bargaining agreement granted the Respondent, at most, the right to determine the number of employees in particular classifications that would staff a given catering function; it did not state or suggest that the Respondent was vested with the right to eliminate employee classifications. The management rights clause—which gave the Respondent the right to select and direct the number of employees assigned to any particular classification of work—also fails to establish a sound arguable basis for the Respondent’s assertion of the contractual right to eliminate a particular classification. This is so even assuming *arguendo* that implicit in the right to select the number of employees assigned to any particular classification is the right to assign *no* employees to a classification and *de facto* eliminate it. Article 12 of the collective-bargaining agreement—which stated that the classifications set forth in Addendum A “shall prevail during the term of the contract”—effectively forecloses such an interpretation. Clearly, a classification that has been eliminated no longer prevails. Further, the first sentence of the management rights clause stated that the clause applied “[e]xcept as expressly and clearly limited by the terms of this Agreement.”

Finally, the “past practices” cited by the Respondent do not establish a sound arguable basis for the Respondent’s interpretation of the contract. First, for the same

¹⁴ The Respondent additionally argues that the Union waived its right to bargain regarding the restructuring decision by (1) failing to demand bargaining earlier, despite having had knowledge of the anticipated reorganization for several months, and (2) acquiescing in the Respondent’s past practice of using unfettered discretion in making staffing decisions under Addendum B-5, including the “routine and consistent performance” by GSMs of bargaining unit work. The Board need not address these contentions, however, because even assuming the truth of the asserted facts, they do not demonstrate the Union’s consent to the elimination of the unit positions.

¹⁵ The Respondent’s reliance here on *First National Maintenance* is unavailing for the same reasons discussed above with respect to the changes to the scope of the unit.

reasons discussed above, the fact that the Respondent retained the discretion to staff events as it deemed appropriate does not support a conclusion that the contract authorized the Respondent to eliminate job classifications. Second, the fact that the Union did not object to the nonunit GSMs' performance of captains' job duties at events to which no captains were assigned (or at events where both captains and GSMs were used and their duties overlapped) does not constitute the Union's acquiescence to the elimination of the captains' jobs.

For all of these reasons, we conclude that the Respondent lacked a sound arguable basis for its interpretation of the contract and, accordingly, modified the terms of the contract in violation of Section 8(d).¹⁶

AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commercial Workers Union, Local 1625 is a labor organization within the meaning of Section 2(5) of the Act.

3. By eliminating the banquet captain and bar captain classifications and transferring the work previously performed by employees in those classifications to nonunit employees, thereby altering the scope of the unit, without the Union's consent, the Respondent violated Section 8(a)(5) and (1) of the Act.

¹⁶ As stated above, the judge found that the Respondent's elimination of the captain and bartender classifications rendered inoperative various provisions of the parties' collective-bargaining agreement—including the hourly wage rates assigned to those classifications, seniority-based scheduling priority, separate gratuity pools and distribution of gratuities, and the requirement that employees assigned to work in a higher-paying position be compensated at the higher rate—and that those modifications of the contract without the Union's consent violated Sec. 8(a)(5) and (1). The Respondent excepted to this finding; the General Counsel filed a cross-exception requesting that the Board specifically find that, by those actions, the Respondent acted in derogation of its duties under Sec. 8(d) of the Act, and the General Counsel further requests that the Board order the Respondent to adhere to the terms of the contract. The General Counsel also contends that the judge erred by failing to find that changes to the following additional terms of the parties' contract constituted unlawful midterm modifications in contravention of Sec. 8(d): (1) the article 21 provision regarding the scheduling of employee vacations based on seniority within classifications, and (2) the provision in Addendum B-5 authorizing the scheduling of captains for up to 65 hours of work per week. Because we have found that the Respondent's elimination of the captain and bartender classifications unlawfully modified the parties' collective-bargaining agreement in contravention of Sec. 8(d), we find it unnecessary to decide whether each of the above-described changes to the captains' and bartenders' terms and conditions of employment constitute independent unlawful midterm contract modifications, as the finding of a violation would not materially affect the remedy.

4. By eliminating the banquet captain, bar captain, and bartender classifications, the Respondent modified the parties' collective-bargaining agreement without the Union's consent, in violation of Section 8(a)(5) and (1) and 8(d) of the Act.

5. By refusing to provide the Union with requested relevant information relating to its decision to eliminate job classifications and transfer the work previously performed by employees in those classifications, the Respondent violated Section 8(a)(5) and (1) of the Act.

6. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and take certain affirmative action designed to effectuate the policies of the Act. With respect to the Respondent's unlawful alteration of the scope of the unit, we shall order the Respondent to restore the status quo ante by reinstating the banquet captain and bar captain classifications to the certified unit represented by the Union and by offering the employees who previously held those positions reinstatement as captains with the same wages, benefits, and other terms and conditions of employment that they had prior to the elimination of their positions. With respect to the Respondent's unlawful modification of the parties' collective-bargaining agreement without the Union's consent, by virtue of its elimination of the captain and bartender classifications, we shall order the Respondent to restore the status quo ante and to continue in effect all terms and conditions of employment contained in the collective-bargaining agreement covering its employees. We shall also order the Respondent to make the former captains and bartenders whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful actions. The make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). In addition, in accordance with our recent decision in *Latino Express, Inc.*, 359 NLRB No. 44 (2012) the Respondent shall compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

Finally, having found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to provide

the Union with relevant requested information, we shall order it to furnish the Union with the requested information.

ORDER

The National Labor Relations Board orders that the Respondent, Walt Disney World Co., Lake Buena Vista, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Altering the scope of the bargaining unit without the consent of the Union.

(b) Failing to continue in effect the terms and conditions of its 2007–2010 collective-bargaining agreement with the Union by eliminating job classifications without the consent of the Union.

(c) Failing and refusing to provide the Union with requested information that is relevant and necessary to the performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore the banquet captain and bar captain bargaining unit classifications as they existed in the Respondent's catering department prior to June 29, 2008, and offer the former banquet captains and bar captains reinstatement to their prior positions, with the same wages, benefits and other terms and conditions of employment that existed prior to June 29, 2008.

(b) Rescind the unilateral elimination of job classifications in the Respondent's catering department and restore the status quo ante as it existed prior to June 29, 2008, and continue in effect all of the terms and conditions of employment contained in its 2007–2010 collective-bargaining agreement, or other applicable collective-bargaining agreement, with the Union.

(c) Make whole the banquet captains, bar captains, and bartenders for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful actions in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) Furnish the Union with the information requested on May 9 and June 19, 2008 that it has not already provided.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an

electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Lake Buena Vista, Florida, copies of the attached notice marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 9, 2008.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. March 19, 2013

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

¹⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WALT DISNEY WORLD CO.

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT alter the scope of the bargaining unit without the consent of the Union.

WE WILL NOT fail to continue in effect the terms and conditions of the 2007–2010 collective-bargaining agreement with the Union by eliminating job classifications without the consent of the Union.

WE WILL NOT fail and refuse to provide the Union with requested information that is relevant and necessary to the performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL restore the banquet captain and bar captain bargaining unit classifications as they existed in our catering department prior to June 29, 2008, and offer the former banquet captains and bar captains reinstatement to their prior positions, with the same wages, benefits and other terms and conditions of employment that existed prior to June 29, 2008.

WE WILL rescind the unilateral elimination of job classifications in our catering department and restore the status quo ante as it existed prior to June 29, 2008, and continue in effect all of the terms and conditions of employment contained in our 2007–2010 collective-bargaining agreement, or other applicable collective-bargaining agreement, with the Union.

WE WILL make whole the banquet captains, bar captains, and bartenders for any loss of earnings and other benefits suffered as a result of our unlawful actions.

WE WILL furnish the Union with the information requested on May 9 and June 19, 2008 that we have not already provided.

WALT DISNEY WORLD CO.

Christopher C. Zerby, Esq., for the General Counsel.
Peter W. Zinober and Ashwin R. Trehan, Esqs., for the Respondent.

Richard P. Siwica, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Tampa, Florida, on April 1, 2, and 3, 2009. The complaint issued on October 31, 2008, and was amended on February 10, 2009, and at the hearing.¹ It alleges that the Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act by unilaterally eliminating bargaining unit classifications, unilaterally transferring unit work, and refusing to provide the Union with requested relevant information. The Respondent's answer denies all alleged violations. I find that the Respondent violated the Act substantially as alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Walt Disney World Co., the Company, operates an entertainment complex, Walt Disney World Resort, at Lake Buena Vista, Florida, at which it annually derives gross revenues in excess of \$500,000 and purchases and receives goods and materials valued in excess of \$50,000 directly from points located outside the State of Florida. The Company admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that United Food and Commercial Workers Union, Local 1625, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview

Walt Disney World is an entertainment complex at Lake Buena Vista, Florida. In addition to its well known theme parks, Magic Kingdom, Epcot, Disney-MGM Studios, and Animal Kingdom, the Company operates 22 resort hotels as well as other attractions. The Company seeks to attract conferences, conventions, and similar events, and it is therefore in competition with various hotels and resorts for that business. Customers, both corporate and individual, may arrange for catered events including weddings, family reunions, conferences, and conventions. This case involves employees represented by the Union who work at those catered events.

The Service Trades Council Union (STCU) consists of six labor organizations that represent employees performing various duties throughout the entertainment complex. The Com-

¹ All dates are in 2008 unless otherwise indicated. The charge was filed on June 26 and was amended on August 28.

pany and STCU are parties to a master agreement covering all represented employees that is supplemented by various addenda that relate to the wages and working conditions specific to employees represented by the constituent labor organizations that comprise the STCU. United Food and Commercial Workers Union, Local 1625, the Union, represents employees involved in the sale of merchandise and catering. This proceeding relates only to employees involved in catering. At all times relevant to this proceeding, Juleeann Jerkovich was secretary/treasurer of the Union and was its representative in dealings with the Company.

During the relevant time period herein, Ann Williams was director of catering and convention services for the Company, and Jerry Vincent was manager of labor relations with responsibilities relating to the STCU collective-bargaining agreement. Williams reported to Vice President Rosemary Rose. Vincent reported to Vice President of Labor Relations Phil Bernard. Williams and Vincent both testified at the hearing herein. Rose and Bernard did not testify.

The facts in this case, with few exceptions, are not in dispute. The issues are whether the Company was obligated to give notice to and bargain with the Union regarding the decision to eliminate the unit classifications of banquet captain, bar captain, and bartender and to reassign the work performed by employees in those job classifications and whether the Company failed to provide requested relevant information with regard to its actions.

B. Procedural Matters

At the hearing, Respondent requested I issue a protective order relating to certain documents containing proprietary and financial information. Neither General Counsel nor Charging Party objected, and, on the record, I ordered that General Counsel Exhibit 15, Charging Party Exhibit 1, and Respondent's Exhibits 19–24 be subject to the protective order, that they are not in the public domain, and that, with the exception of the portions thereof upon which testimony in this public hearing was taken, could not be disclosed to anyone other than the attorneys of record and officers of the Union and Company. The documents may be accessed by any reviewing authority. I directed the documents subject to my order be placed under seal. The reporting service inadvertently failed to submit Respondent's Exhibits 19–24 under seal. I have corrected that inadvertence. All documents subject to my order are in a separate sealed manila envelope marked "Confidential." My jurisdiction over this proceeding ends with its transfer to the Board. I alert the Board to the presence of these documents in order to assure they are treated as confidential even when sent to the Case Records Unit. See *United Parcel Service*, 304 NLRB 693 (1991).

The Respondent requests that I reverse the decision of the Regional Director not to defer this case to the grievance arbitration procedure of the collective-bargaining agreement. This case involves interrelated issues of modification of the scope of the bargaining unit, transfer of unit work, and failure to provide requested relevant information. "Board policy. . . disfavors bifurcation of proceedings that entail related contractual and statutory questions." *Avery Dennison*, 330 NLRB 389, 390 (1999). I deny the request to defer this case to arbitration.

C. The Collective-Bargaining Agreement

The current collective-bargaining agreement is effective from April 29, 2007, until October 2, 2010. Article 3 of the STCU master agreement recognizes the STCU as the exclusive collective-bargaining representative of full-time employees "who are in the classification of work listed in Addendum 'A' at Walt Disney World." Addendum A lists, among other classifications, banquet facility, banquet servers, beverage host/hostess banquets, beverage captain, and food and beverage captain. Informally, the foregoing classifications are referred to as housemen, servers, bartenders, bar captains, and banquet captains.

Article 12, Section 1, of the master agreement, provides as follows:

The job classifications and rates of pay which shall prevail during the term of this Agreement are set forth and contained in Addendum "A" attached hereto and considered in all respect to be a part of this Agreement.

The master agreement, article 5, contains a management-rights clause that provides, insofar as relevant to this proceeding, as follows:

Except as expressly and clearly limited by the terms of this Agreement, the Company reserves and retains exclusively all of its normal and inherent rights with respect to the Management [sic] of the business, including but not limited to, its right to select and direct the number of employees assigned to any particular classification of work; to subcontract work, to establish and change work schedules and assignments; . . . to institute technological changes, including but not limited to, work automation processes and otherwise to take such measures as Management may determine to be necessary to the orderly, efficient and economical operation of the business.

The prior contract contained the same management-rights clause.

Article 16, Section 2(b)(2) provides that "[w]hensoever an employee is assigned or transferred to perform two (2) or more job classifications during the day, the employee will receive his/her permanent rate or the rate for the classification to which he/she was transferred, whichever is higher"

Addendum B-5 relates to employees represented by UFCW Local 1625, the Union. In addition to provisions relating to merchandise sales personnel, Addendum B-5 addresses the working conditions of employees involved in catered events.

The Catering Payment Policy provides that "[a]ll Resort Catering operations will maintain separate Bartender/Server gratuity pools" and that a 15 percent gratuity will be "calculated on the actual food and beverage price charged to the client." One percent (1%) of the 15 percent gratuity is shared among the housemen. The remaining 14 percent is allocated as follows:

In the server gratuity pool, thirteen and one-half percent (13½ %) is shared by banquet servers and captains; an additional one-half percent (½ %) is shared among the banquet captains.

In the bartender gratuity pool, thirteen and one-half percent (13½ %) is shared by beverage servers and captains; an addi-

tional one-half percent (½ %) is shared among the bar captains.

The Addendum's Staffing Guidelines state that "[m]anagement reserves the right to staff functions as deemed appropriate." The foregoing provision is followed by a boxed statement, "Standard number of Bartenders" and provides for one bartender per 100 guests at functions with an open bar. The prior agreement included the same provision regarding bartenders and had also set out guidelines for banquet captains. That provision stated that the "[s]tandard number of captains" was one captain for functions of between 100 and 250 guests, two captains for functions with from 250 to 500 guests, and three captains for functions with more than 500 guests. An asterisk noted that the parties recognized that the "numbers represent a guideline and may fluctuate from event to event." The current agreement contains no provision specifying a standard number of banquet captains.

Former bartender Jeffery Kemp, who regularly served as a relief bar captain prior to the Company's elimination of captains, was on the negotiating committee of the Union regarding the addendum. He testified, without contradiction by Manager Vincent, that at the 2007 negotiations, Vincent proposed the elimination of the classification of bartender, that the Union rejected that proposal, and that, at the next negotiating session, Vincent withdrew the proposal.

The Company has administratively separated its catering operations into seven areas: Boardwalk, Contemporary, Coronado Springs, Epcot, Grand Floridian, Hollywood Studios, and Yacht & Beach Club. Each area includes various resort facilities and other locations at which catered events are held. Thus, Epcot includes the Epcot theme park as well as Downtown Disney and Pleasure Island. Employees are assigned to these various locations, referred to as their "home or statused location."

Paragraph 2 in the provision relating to scheduling provides that servers, bartenders, and captains will be scheduled in their home location first and that the "rotation methodology" for scheduling begins "with the most senior Server, Bartender, or Captain respectively." Paragraph 4 provides that captains "will be eligible to be scheduled for remaining Server and Bar shifts locally, prior to being scheduled globally."

Paragraph 13 provides that "[a]ll Banquet Servers, Bartenders, and Captains will not be involuntarily scheduled less than 1560 hours on an annualized basis. . . . All grievance settlements based on the Company's proven failure to schedule 1560 hours will be paid at the appropriate non-tipped rate of pay."

D. Past Practice

The Company offers a variety of catered events including coffee breaks, which may involve as few as five people, receptions with open bars, and buffet or plated dinners. A banquet guest service manager is ultimately responsible for every catered event. One manager was often responsible for simultaneously occurring events. Employee Patrick Mullen, a former banquet captain, testified that the manager would check with him to assure that everything was being set up properly, meet the client, i.e., the customer who arranged for the event, and then "be off to their next event." In Mullen's experience a man-

ager would be present at each event, "[t]ypically about 25 percent" of the time."

Director of Catering and Convention Services Ann Williams acknowledged, pursuant to staffing functions "as deemed appropriate," that "as a general proposition, functions which exceeded 100 guests or were especially complicated or demanding would be staffed with one or more of the banquet captains," which is consistent with the guidelines set out in the prior collective-bargaining agreement. The only evidence relating to the absence of assignment of a captain to an event with more than 100 guests was the testimony of John Stafford, who in 2008 was director of catering operations, that a captain would not be assigned to a boxed lunch event involving 300 people.

Labor Manager Rebecca Szapacs, who is responsible for scheduling, testified that the decision regarding the assignment of captains was made by the "leaders in the area." She was unfamiliar with any specific guidelines, but was aware that the assignment of captains was dependent upon "how many guests are on an event, what type of event it is . . . [and] the different particulars of the event." Former Banquet Captain Mullen, whose home location was at Epcot, testified without contradiction that his area leader informed him that "[a]nything more than 25 people with a bar at Epcot called for a captain."

Although Director Stafford testified that captains were not assigned to approximately 70 percent of catered events at Disney World, there is no evidence contradicting the admission of Director Williams that, "as a general proposition," captains were assigned to events with 100 or more guests. The Company introduced a document, Respondent's Exhibit 25, reflecting the number of events held in the respective resorts and parks for March and the first week of April and the number of those events to which captains were assigned. As already noted, a coffee break involving a few as five people is considered to be an event. As noted in the brief of the General Counsel, the exhibit confirms that captains were assigned to multiple events. The exhibit does not reflect the number of guests at the events to which captains were not assigned. In the absence of evidence to the contrary, there is every reason to believe, consistent with the past practice of the Company, that the events to which captains were assigned were either complicated or had 100 or more guests and that the events to which they were not assigned were uncomplicated and involved fewer than 100 guests.²

A booklet titled Food and Beverage Education was presented to the Union by the Company and agreed to by the Union in 2004. Although not incorporated into the collective-bargaining agreement, it sets out standards to be followed by "cast members," the term used by the Company when referring to employees. The booklet also sets out specific responsibilities for banquet captains including ensuring the proper appearance of cast members, being readily available at all times "before, during, and after the function," and remaining at the location until the assigned manager signed off on the captain's check list "and all servers have been checked out."

I need not burden this decision with the minute details of the functions formerly performed by captains. In addition to cap-

² I deny the motion of counsel for the Charging Party to reject Respondent's Exhibit 25.

tains, employees identified as relief captains served as captains when there was an insufficient number of captains available.

Former Banquet Captain Mullen would normally report 3 hours before the event, check with the banquet manager regarding any changes of which he needed to be aware, and then review the banquet event order (BEO) sheet and determine who would be assigned to which job tasks. He would review the diagram reflecting the manner in which the event was to be set up and begin obtaining whatever equipment was needed. As the servers arrived, he would confirm that they were appropriately attired with name tags and the "right costume." He would conduct a preshift meeting relating to the event, reviewing the BEO and confirming the menu and any special dietary needs. If necessary for a plated dinner, he would set out a sample place setting. He would then assign the servers to their respective locations and oversee the event, signaling when to begin serving and when to begin clearing, "[p]retty much everything ran on signal."

Jeffrey Kemp, formerly a bartender, explained that, prior to July 2008, he was assigned to work as a relief bar captain about 90 percent of the time. When working as a captain, he would "pull the banquet event orders (BEOs), check for any changes, and make sure that 'everything we would need' was on hand. He would check the diagrams to determine how the area, whether inside or outside, was to be set up and where the bars would be located. He would conduct a preshift meeting with the bartenders, reviewing the Company's standards, and then assign the bartenders to their respective locations. Shortly before the event began he would check with the client to see 'if they had any special needs,' such as opening one bar early for special guests, and then oversee the event, assisting bartenders as necessary and handling any issues such as a guest being 'over served' or someone underage attempting to obtain an alcoholic beverage. Following the event he would fill out billing consumption sheets based upon the amount of the various types of beverages consumed both for billing purposes and to assure that the inventory was properly stocked.

Both Mullen and Kemp testified that the foregoing functions are now performed by managers. Their testimony is confirmed by a list provided by Director Stafford to Director Ann Williams which reflects that, upon elimination of the classification of captain, managers rather than captains would be responsible for pre-event tasks including confirming the equipment necessary for the function, making job assignments, conducting the "pre-meal meeting," and assuring "cast accountability." At the event the manager would be responsible for delivering "direction for times of service" and assuring "accountably for proper standards" relating to bar service." After the event the manager would be responsible for inventory and billing. An email from Williams to Vincent dated June 9, notes that "these responsibilities are currently shared."

The Company has a responsible vendor program (RVP) regarding the serving of alcoholic beverages. Many servers have received that training and served as bartenders at functions held in the theme parks and, when there was an insufficient number of bartenders available, at the resorts. When so doing, consistent with article 16, section 2(b)(2) of the STCU master agree-

ment, they would have been compensated at the bartender rate and participated in the bartender gratuity pool. Director Williams confirmed, consistent with the provisions in the addendum relating to Scheduling, as set out in paragraph 2, that bartenders were scheduled based upon seniority and were given first priority to be assigned to work as bartenders at the resorts in their home locations.

E. Facts

On May 5, the Company informed the Union that it was eliminating the classifications of banquet captain, beverage captain, and bartender. On Friday, May 2, Secretary/Treasurer Jerkovich met manager of labor relations Jerry Vincent as she was getting off of an elevator. Vincent asked whether she had received his voice mail message, and she reported that she had not. Vincent informed her that the message related to a meeting that he wished to have on Monday at 9 a.m. relating to "some restructuring or reorganizing in the catering department." Jerkovich asked whether the matter could be handled by telephone. Vincent replied that it could.

On Monday, May 5, Vincent called Jerkovich at 9 a.m. and informed her that the Company "was going to move forward with some reorganization" regarding classifications of employees represented by the Union, that captains and bartenders were to be eliminated, and the work would be done in the future by managers. I note that Vincent misspoke insofar as the work of bartenders continued to be performed by unit personnel. Jerkovich confirmed that the reorganization included bar captains. Vincent advised that the Company "would be open to effects bargaining" and that the Company was going to announce the reorganization to the affected employees at 2 p.m. that afternoon. He invited Jerkovich to the meeting.

Jerkovich stated that she did not believe that the Company had the right to do what they were proposing and that she would not attend the meeting insofar as it "would look as though we agree with this decision" or were "complicit" in it. She added that the Union did not agree that the only responsibility of the Company was "effects bargaining."

At the May 5 employee meeting, Director Williams informed the affected 27 captains of the elimination of their classification and stated that they could become servers, apply for positions as managers insofar as 24 new manager positions were being created, or place themselves in the labor pool, referred to as casting, for any available position. She told the nine bartenders they would be "transitioned to a server role" in order to "create consistency with Catering Operations."

Williams did not address the monetary aspects of the foregoing changes, stating that the restructuring was "still being discussed the Union" and that it would be "premature to speculate about the financial implications." The record does not reflect whether Williams acknowledged that certain financial implications were inherent in the Company's actions including elimination of the separate bartender and server gratuity pools, the extra ½ percent gratuity paid to captains, and the separate scheduling by seniority for banquet captains, bar captains, and bartenders, all of which were terms and conditions of employment set out in the collective-bargaining agreement.

On May 7, Jerkovich wrote Manager Vincent complaining that a written description "of what the Company is intending" had been promised, but that she had not received the information. Vincent replied, confirming the elimination of the "Banquet Captain role" and "Bartender role" and stating that the reorganization would occur "during the third week in June." He offered to discuss the "impact on our employees" of the reorganization.

On May 9, Union Attorney Richard Siwica wrote Vincent protesting that the Company had no authority to remove bargaining unit work and stating that its obligation was not limited to discussing "the re-organization and its impact." The letter requests information for the purpose of evaluating a possible grievance. Paragraph 3 requests "documents, studies, reports or any other information upon which the Company based their decision to make the change." Paragraphs 5, 6, and 7 seek documents comprising a "Strategy Plan" or "Five Year Strategy Plan" relating to the decision to "restructure" and documents relied upon by the Company to generate and implement the plan.

On May 16, Vincent wrote that the Company would respond by May 21, and he did so by letter stating that the Company "disagrees" with the position of the Union regarding the removal of bargaining unit work and reiterating its offer to engage in bargaining over "the effects of the elimination" of the classifications. Some of the information requested was provided, including the "message points" that Williams had communicated to the employees on May 5. Regarding the documents sought in paragraphs 3, 5, 6, and 7, the Company responded that the information was the "exclusive property of the Company and is not relevant for the purpose of negotiating the effects of the change."

On June 19, the Union, in a letter from Attorney Siwica, sought further information. Paragraph 3 requested information regarding when the decision to eliminate the classifications was made, who made the decision, and all documents relating to the decision to select "these individuals for 'role elimination.'"

On July 2, Vincent replied, providing much of the information sought, but refusing to inform the Union of who made the decision or when the decision to eliminate the classifications was made. The Company continued to decline to provide documents relating to the decision because they were the "proprietary information of the Company."

At the hearing herein, Vincent, who has taken a position with a different employer, acknowledged that the Company made no offer to bargain about the elimination decision or to alter the decision. He offered to bargain only about effects. The Company had already informed the displaced employees of their options, and the elimination of the classifications nullified the contractual provisions relative to those classifications.

Secretary/Treasurer Jerkovich agreed that the Union refused to engage in effects bargaining because the Union claimed that the Company was obligated to bargain about the decisions it had made. Regarding the information requests, Jerkovich explained that the Union was seeking to understand the basis for the Company's decision, the "reason for doing this," as well as "to evaluate a potential grievance that the Union might bring on

behalf of the banquet employees that we represented," and "[l]ast, but not least" to have information to prepare for bargaining if we "were to engage in bargaining."

Ann Williams assumed her position as Director of Catering and Convention Services in June 2006. In December 2006, she met with upper management regarding concern that guests' satisfaction ratings had declined. In October 2007, she presented a proposal, WDW Catering Operations, Disney Service, Basic Proposal, to upper management in which she attributed the decline in guest ratings to various factors including time devoted to what she termed as "frivolous grievances" and her belief that "[a]dversarial attitudes [were] encouraged and promoted by" Jerkovich. She proposed eliminating the classifications of captain and bartender and adding 24 banquet guest service managers. In testimony Williams stated that she believed that there was "a turbulent environment between cast members [employees]" and that the proposed increase in managers would provide "more direct support from the leadership" by increasing "the time that the managers were on the floor to help resolve any issues."

A pilot program was conducted at the Yacht and Beach Club sometime in 2007. William's October 2007 proposal states that the pilot program "has been successful." It notes that the amount of time managers were on the floor was increased "from 50 to 60% to more than 90%." As already noted, in former Banquet Captain Mullen's experience, managers were present about 25 percent of the time. Former Bartender Kemp's home location is the Yacht and Beach Club. He recalled a period in which managers were "more visibly on the floor, but they weren't assigning duties." William confirmed that the "pilot program did not have any effect on the responsibilities of bargaining unit employees at the Yacht and Beach Club."

The October 2007 proposal was refined, resulting in WDW Catering Operations, Disney Service, Basic Proposal, dated January 2008. A copy of what appears to be that proposal was left anonymously at Secretary/Treasurer Jerkovich's home after Vincent's announcement to her on May 5, but before May 9. Williams testified that the document "appears to be" identical to the final version upon which the Company acted. The reference to a "strategic plan" in the Union's first information request was predicated upon language in the document.

Vincent testified that some comment by Jerkovich caused him to believe that the Union had somehow obtained a copy of the proposal prior to May and that he reported his belief to his superiors who in turn reported it to Williams. The Company, in its brief, argues that "none of the testimony . . . by Williams and Vincent" regarding their belief that Jerkovich had possession of the document "is controverted," and that the Union waived any right to bargain by failing to request bargaining upon learning of the existence of the reorganization plan. Although the testimony regarding Vincent's belief is uncontroverted, the ultimate fact is specifically controverted. I place no reliance upon Vincent's belief, actually his suspicion. He acknowledged that, in a meeting in late May or early June, Jerkovich confirmed that she had received a copy of what she understood was the document upon which the Company was acting. Jerkovich credibly denied having received the document

prior to May 5, and I credit her testimony. Thus, there was no waiver because the Union had no knowledge of the Company's intentions until Vincent announced the elimination decision to Jerkovich on May 5.

Vincent did not provide either the October 2007 or January 2008 WDW Catering Operations, Disney Service, Basic Proposal in response to the Union's information request, and the Respondent failed to include the January 2008 document among the documents provided to counsel for the General Counsel pursuant to subpoena. I do not fault Counsel for the Respondent in this regard. Counsel can only produce what the client provides. I am, however, disturbed that the Respondent failed to produce this subpoenaed document that was the blueprint for its actions.

The Union, prior to May 5, was unaware of the Company's decision. There is no evidence that Manager Vincent, who was the representative of the Company with whom the Union regularly dealt, ever mentioned any concerns regarding frivolous grievances, Jerkovich's purported adversarial attitude, or turbulence among employees. So far as this record shows, he was not involved in any aspects of the decision except announcing it to the Union. Williams testified that the revised proposal of January 2008 was approved sometime in late March. She did not give an exact date nor did she identify who made the decision to eliminate the job classifications and transferred the bargaining unit work.

The elimination of captains and bartenders occurred on June 29 at Boardwalk, Grand Floridian, and Hollywood Studios and on July 6 at Epcot, Contemporary, Coronado Springs, and the Yacht and Beach Club. Functions formerly overseen by captains are now overseen by managers. It appears that two former captains and three relief captains were among those hired into the 24 newly created manager positions. Due to the national economic downturn, only 20 of the new positions were filled. The former captains who did not apply for managerial positions, so far as the record shows, became servers.

Former captains no longer oversee events. They wait on tables as servers, as do the former bartenders. The elimination of the bartender classification effectively eliminated the separate bartender and server gratuity pools. The elimination of captains eliminated the extra ½ percent gratuity paid to them from the respective gratuity pools. Neither captains nor bartenders have priority based upon seniority for work in their separate classifications. Former bartender Kemp, who had worked as a relief bar captain 90 percent of the time and as a bartender the remaining 10 percent, became a server. Since July he has been assigned to tend bar, "but not very often."

All servers now share in the 14 percent gratuity remaining after the 1 percent given to housemen. The WDW Catering Operations, Disney Service, Basic Proposal, January 2008, notes that "redistribution of the gratuity pool" will increase the pay of 90 percent of the "Cast population," i.e. the servers who formerly received only 13½ percent.

The Company has continued to pay the employees who formerly occupied the eliminated classifications at their contractually established base rate.

F. Analysis and Concluding Findings

1. The elimination of the unit classifications

The complaint, in paragraphs 6, 7, and 11, alleges that elimination of the unit classifications of banquet captain and beverage captain and transfer of their work to nonunit managers and elimination of the unit classifications of bartenders and transfer of their work to other unit personnel unlawfully altered the scope of the bargaining unit. It further alleges that the alteration of terms and conditions of employment set forth in the collective-bargaining agreement, including but not limited to payment at the highest applicable contractual wage rate for work performed in other classifications, the wage rates prescribed for the eliminated classifications, gratuity distribution, and scheduling priority by seniority in the eliminated classifications, constituted a failure to continue in effect all terms and conditions of employment set forth in the collective-bargaining agreement.

The legal principles involved herein are well settled. The scope of a collective-bargaining unit is a permissive subject of bargaining whether the unit was certified by the Board or agreed upon by the parties, and an employer may not alter the scope of the unit "without first securing the consent of the union or the Board." *Hampton House*, 317 NLRB 1005 (1995); *Holy Cross Hospital*, 319 NLRB 1361 (1995). Section 8(d) of the Act requires an employer and union to bargain collectively "in good faith with respect to wages, hours, and other terms and conditions of employment." Section 8(d) and longstanding precedent establish that an employer is prohibited "from modifying the terms and conditions of employment established by . . . [a collective-bargaining] agreement without obtaining the consent of the union." *Nick Robilotto, Inc.*, 292 NLRB 1279 (1989); *St. Vincent Hospital*, 320 NLRB 42 (1995).

The elimination of the unit classifications of banquet captain, bar captain, and bartender altered the scope of the unit. Although the Respondent continued to pay the employees formerly in those classifications their contractual wage rate, the elimination of the separate bartender and server gratuity pools and the extra ½ percent gratuity paid to captains modified the terms of the collective-bargaining agreement and directly affected the compensation of those employees. As pointed out in the brief of the General Counsel, although the gratuity for servers was increased to 14 percent, that increase was an unlawful midterm contract modification. The bartenders and captains no longer have scheduling priority in their respective classifications. Most significantly, their working conditions were substantively changed. Captains no longer are overseeing functions, they are waiting tables. Bartenders, unless they happen to be assigned to a bar as a server, are no longer mixing and pouring drinks, they too are waiting tables.

The Respondent argues that the management-rights clause coupled with the provision in the addendum that "[m]anagement reserves the right to staff functions as deemed appropriate" gave it the right to eliminate the classifications of captain and bartender. I disagree. As pointed out in the discussion of waiver in *Regal Cinemas*, 334 NLRB 304, 313 (2001), citing precedent, any waiver must meet the "clear and unmistakable standard governing the waiver of statutory rights." The manage-

ment-rights clause herein, which provides that management may “select and direct the number of employees assigned to any particular classification of work,” assumes the existence of those classifications in which the employees are to be assigned. Article 12, Section 1, of the master agreement provides that “[t]he job classifications and rates of pay which shall prevail during the term of this Agreement are set forth and contained in Addendum ‘A’ attached hereto and considered in all respect to be a part of this Agreement.” The pay rates of captains and bartenders are set forth therein. Paragraph 13 of Addendum B-5 provides that “[a]ll Banquet Servers, Bartenders, and Captains will not be involuntarily scheduled less than 1560 hours.” There is no waiver, clear, unmistakable, or otherwise. The management-rights clause relating to the “number of employees assigned to any particular classification of work” contains no language relating to elimination of any classification, and Article 12, Section 1 contains the contractual mandate that the “job classification and rate of pay . . . in Addendum ‘A’ . . . shall prevail” during the term of the collective-bargaining agreement.

The provision in the Addendum that “[m]anagement reserves the right to staff functions as deemed appropriate” assumes the staffing of functions. Captains and bartenders worked consistently in those contractually recognized classifications pursuant to the collective-bargaining agreement. What constitutes appropriate staffing is established, at the least, by the scheduling provision of the addendum which provides for scheduling beginning “with the most senior Server, Bartender, or Captain respectively.” Thus, at functions at which alcohol was served, bartenders would be scheduled and assigned and, consistent with the guidelines in the current collective-bargaining agreement, it would normally be appropriate to assign a bar captain if 100 or more guests were to be present. Similarly, consistent with the past practice of the parties, banquet captains would be assigned to complicated functions or functions with over 100 guests. The “as deemed appropriate” provision gives the Respondent the right, within the strictures of the collective-bargaining agreement, to staff a particular function with more or fewer unit employees in their various unit classifications. It does not grant the Respondent authority to eliminate bargaining unit classifications or to transfer bargaining unit work.

The Respondent, citing the decision of the Court of Appeals in *Gratiot Community Hospital v. NLRB*, 51 F.3d 1255 (6th Cir. 1995), argues that it has the “right to select the number of employees-including zero-assigned to any classification of work.” In that case, the Court of Appeals refused to enforce a portion of the Board’s order and held that the provision in the applicable collective-bargaining agreement providing that “[a]ssignments to the Seventy Hour Shift will be made by the Director of Nursing in cooperation with the employees involved” and that “[t]he Director of Nursing will decide the number of assignments and the work areas that will be under the Seventy Hour Shift,” gave the hospital the right to abolish the 70-hour-shift program by determining that the number of shifts would be “zero.” *Id.* at 1260–1261. The foregoing decision does not constitute Board precedent and is inapposite. It addresses the right of the hospital to abolish a program by not assigning shifts. It does not address the elimination of contrac-

tually established job classifications or the reality that the Respondent herein was not abolishing the catering functions that it was continuing to staff, albeit not in accord with the collective-bargaining agreement.

Any contention that the contract permitted the Respondent to abolish job classifications unilaterally is belied by the uncontradicted testimony of former bartender Jeffery Kemp that, at the 2007 addendum negotiations, Vincent proposed the elimination of the classification of bartender. The Union rejected that proposal. At the next negotiating session, Vincent withdrew that proposal which was a permissive subject of bargaining. If the Respondent genuinely believed that the contract permitted elimination of the classification, there would have been no need to have made that proposal.

Neither the management-rights clause nor the staffing addendum constituted a waiver whereby the Respondent was privileged to abolish the job classifications of captain and bartender, the scheduling priorities applicable to those classifications, the separate gratuity pools, and the ½ percent additional gratuity for banquet captains and bar captains respectively.

The Respondent’s decision to eliminate the classification of captain and assign the work of captains to managers did not constitute an entrepreneurial decision relating to the “scope and direction of the enterprise.” *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 (1981). The Respondent, citing *Noblitt Bros.*, 305 NLRB 329 (1992), and *AG Communications Systems Corp.*, 350 NLRB 168 (2007), argues that the decision did constitute a change in the scope and direction of the enterprise. I disagree. In *Noblitt Bros.*, the new owner formed a telemarketing division and “eliminated the walk-in sales function for the showroom.” In *AG Communications Systems Corp.*, two bargaining units were merged after Lucent Technologies acquired A.G. Communications which “ceased to exist as an operating entity.”

In the instant case, there was no change in either the scope or direction of the enterprise. The decision herein was a staffing decision. Guests continue to be served at catered functions in the same venues located throughout Disney World. The same equipment is used. The guests are served by the same corps of servers, servers whose numbers have been increased by the addition of the former captains and bartenders. The work of captains continues to be performed, albeit by guest service managers. The work of bartenders continues to be performed without the priority of assignment given to the former bartenders. “[W]hen virtually the only circumstance the employer has changed is the identity of the employees doing the work . . . the decision did not involve a change in the scope and direction of the enterprise that is exempt from the statutory bargaining obligation.” *Geiger Ready-Mix Co. of Kansas City*, 315 NLRB 1021, 1023 (1994). The Respondent’s staffing decision herein had an immediate and direct effect upon the working conditions of captains and bartenders, employees represented by the Union whose classifications and working conditions were specifically addressed in the collective-bargaining agreement.

Although managers did perform the same work as captains at functions to which captains were not assigned, the past practice of the parties, consistent with the uncontradicted testimony of

former captain Muller and the admission of Director Williams, establishes that, at the least, captains were normally assigned to functions which exceeded 100 guests or were especially complicated or demanding. Applying the direction of the Supreme Court when addressing the issue of work preservation in *NLRB v. Longshoremen ILA*, 447 U.S. 490, 507 (1980), the Board “must focus on the work of the bargaining unit employees, not on the work of other employees who may be doing the same or similar work.” The Respondent, when conducting its pilot program, recognized that the organization and oversight of large or complicated functions constituted bargaining unit work and carried out that program at the Yacht and Beach Club without having any effect upon bargaining unit employees.

The Respondent was free to hire additional managers without notice to and bargaining with the Union. It was not privileged to eliminate unit classifications and unilaterally transfer bargaining unit work to those managers. *Hampton House*, supra at 1005.

Elimination of the classification of captains was not necessitated by the hiring of additional managers. The October 2007 proposal reported that the pilot program “has been a success.” That program, according to Williams, was conducted without “any effect on the responsibilities of bargaining unit employees.” During that program, former bartender Kemp observed that more managers were “visibly on the floor, but they weren’t assigning duties.” The Respondent did not address how its determination to have an increased managerial presence necessitated the elimination of captains insofar as the successful pilot program had no effect upon bargaining unit employees.

The Respondent’s “message points” in Williams’ presentation to the affected employees on May 5 reflect that the bartenders were informed that the rationale for elimination of the bartender classification was to “create consistency with Catering Operations.” No further rationale was presented at the hearing herein. As set out in the addendum to the collective-bargaining agreement, those employees had participated in a separate gratuity pool and had priority with regard to bar assignments at functions at which alcohol was served. The elimination of the bartender classification was unrelated to the work of captains or the assignment of additional managers to catered events. Although the Respondent continued to pay the former bartenders at their former base rate, the elimination of the classification with its higher wage rate deprived servers who were assigned to work as bartenders of that higher rate and their share of the separate bartender gratuity pool. Because bartenders no longer had priority for bartending assignments, the Respondent effectively transferred bargaining unit work from the higher paying bartender classification to the lower paying server classification. See *Lexus of Concord, Inc.*, 343 NLRB 851, 865 (2004).

The decision to eliminate captains and bartenders was not dictated by any emergency, technological change, or other unforeseen events. Discussion regarding the catering operation began in 2006, and the proposal, first presented in October 2007 and revised in January 2008, was not approved until March. Despite the Respondent’s belief that its guest service

was less than optimal because of a turbulent environment relating to “cast members,” frivolous grievances, and an adversarial attitude on the part of Jerkovich, there is no evidence that it sought to address any of those issues with the Union or involve the Union in any discussion in an effort to rectify the perceived problems. The elimination of classifications was not a necessary component of the implementation of the increase in a managerial presence at catered functions as confirmed by the successful pilot program at the Yacht and Beach Club.

The Respondent was not privileged to alter the scope of the unit by unilaterally eliminating the classification of bar captain and banquet captain without the consent of the Union, nor was it privileged to transfer their work to nonunit guest service managers without notice to and bargaining with the Union regarding that decision. The Respondent was not privileged to alter the scope of the unit by unilaterally eliminating the bartender classification without the Union’s consent and transferring their work to other unit personnel without notice to and bargaining with the Union regarding that decision. The foregoing alterations in the scope of the unit and failure to bargain with the Union regarding its decisions to transfer unit work violated Section 8(a)(1) and (5) of the Act.

Paragraph 8 of the complaint alleges, in the alternative, that the transfer of bargaining unit work to nonunit personnel was a mandatory subject of bargaining. The “transfer of bargaining unit work to managers or supervisors is a mandatory subject of bargaining where it has an impact on unit work.” *Regal Cinemas*, supra at 304. In view of my findings herein, this further basis for finding a violation of the Act would be superfluous.

The foregoing unlawful actions rendered inoperative the contractual provisions relating to those unit employees, including the scheduling priority by seniority of the banquet captains, bar captains, and bartenders in their separate classifications, the separate bartender and server gratuity pools, and the ½ percent additional gratuity paid to captains. Although the Company has continued to pay the employees who formerly occupied the eliminated classifications at their contractually established base rate, the elimination of the classifications also eliminated the stated wage for those classifications. The elimination of the classifications of captain and bartender also rendered inoperative Article 16, Section 2(b)(2) of the STCU master agreement providing that employees assigned to work in a higher paying classification be paid at the higher rate. Restoration of the classifications must, therefore, also include restoration of the contractual wage rates applicable to those classifications. The foregoing modifications of the collective-bargaining agreement without agreement of the Union violated Section 8(a)(1) and (5) of the Act.

2. The information requests

Paragraph 9 of the complaint alleges that the Respondent unlawfully failed and refused to furnish the Union with requested relevant information relating to its decisions to eliminate unit job classifications and transfer unit work. As pointed out in the brief of the General Counsel, Vincent’s responses admitted the existence of the requested information but asserted that it was the “exclusive property of the Company and is

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not relevant for the purpose of negotiating the effects of the change.”

I have found that the Respondent was obligated to obtain the consent of the Union regarding its decision to eliminate unit classifications and to give notice to and bargain with the Union regarding its decision to transfer unit work, thus the claim that the information sought was not relevant to effects bargaining has no merit. I am mindful that much of the information that the Respondent should have provided is now available insofar as it has been placed into evidence in this proceeding. Nevertheless, “the duty to supply relevant information is a duty to supply such information in a timely fashion and to provide it to the Union, not to the Board.” *Geiger Ready-Mix Co. of Kansas City*, supra at 1033. The Respondent, by failing to provide requested relevant information to the Union violated Section 8(a)(5) of the Act.

I am mindful that several documents responsive to the information request are subject to the protective order that I issued at hearing. They remain so. Charging Party Exhibit 1 has not been authenticated as the actual WDW Catering Operations, Disney Service, Basic Proposal, January 2008. Williams testified only that it “appears to be” identical, not that it was identical. Thus that document, subject to the protective order, must be produced for purposes of authentication. All other documents responsive to the request of the Union that have not been made a part of this record must also be produced including, but not limited to, documents identifying the individual or individuals who made the ultimate decision to adopt and implement the WDW Catering Operations, Disney Service, Basic Proposal, dated January 2008, and the date the decision was made.

CONCLUSIONS OF LAW

1. By altering the scope of the unit by eliminating the classifications of banquet captain, bar captain, and bartender without the consent of the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

2. By failing to give notice to and bargain with the Union regarding its decision to eliminate the classification of captains and bartenders and to assign the work formerly performed by captains to managers and the work performed by bartenders to other unit personnel, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

3. By modifying the terms and conditions of employment of banquet captains, bar captains, and bartenders as set out in the collective-bargaining agreement without the agreement of the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

4. By refusing to provide the Union with requested relevant information relating to its decision to eliminate those job classifications and transfer the work performed by employees in those classifications, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having altered the scope of the unit by eliminating the unit job classifications of food and beverage captain (banquet captain), beverage captain (bar captain), and beverage host/hostess banquets (bartender) without the consent of the Union, it must restore those classifications.

The Respondent having unilaterally removed employees from the foregoing classifications and transferred their bargaining unit work, it must restore those employees to their classifications and transfer their bargaining unit work back to them.

The Respondent must rescind its modifications of the collective-bargaining agreement and comply with the terms and conditions of employment related to employees represented by the Union as set out in the collective-bargaining agreement unless modification of those terms and conditions of employment are agreed to by the Union.

The Respondent must make whole any employees whose earnings were decreased as a result of the foregoing unilateral changes, including employees who would have received higher wages and tips while serving as relief captains or bartenders, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).³

The Respondent must provide the Union with all documents not already provided relating to its decision to eliminate the classifications of captains and bartenders and to transfer the work performed by employees in those classifications including, for purposes of authentication, WDW Catering Operations, Disney Service, Basic Proposal dated January 2008, said document to remain subject to the protective order.

In view of the Board’s decision in *Glen Rock Ham*, 352 NLRB 516 fn. 1 (2008), I need not address the request of the General Counsel regarding compound interest.

The Respondent must also post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Walt Disney World Co., Lake Buena Vista, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Altering the scope of the recognized unit by eliminating the classifications of food and beverage captain (banquet cap-

³ I am mindful that, as a result of prevailing economic conditions, the revenues of the Respondent have decreased and, therefore, whatever backpay liability might exist may be difficult to calculate. Nevertheless, insofar as calculation may be possible, I do, consistent with precedent, order that all affected employees be made whole.

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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tain), beverage captain (bar captain), and beverage host/hostess banquets (bartender) without the consent of the Union.

(b) Failing to bargain in good faith with United Food and Commercial Workers Union, Local 1625, as the exclusive collective-bargaining representative of employees in its catering operations by unilaterally eliminating the unit classifications of food and beverage captain (banquet captain), beverage captain (bar captain), and beverage host/hostess banquets (bartender) and transferring work performed by employees in those classifications.

(c) Modifying the terms and conditions of employment of employees as set out in the collective-bargaining agreement without the agreement of the Union.

(d) Refusing to provide the Union with requested relevant information relating to its decisions regarding the foregoing unilateral changes.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this order, restore the classifications of food and beverage captain (banquet captain), beverage captain (bar captain), and beverage host/hostess banquets (bartender).

(b) Within 14 days of this order, rescind the unilateral changes and restore the employees removed from their classifications of beverage host/hostess banquets (bartenders), beverage captain (bar captain), and food and beverage captain (banquet captain) to those classifications and restore the work transferred from those classifications to the employees in those classifications.

(c) Within 14 days of this order, rescind the unilateral modifications of the collective-bargaining agreement relating to the terms and conditions of employment of employees in all classifications represented by the Union in the catering operation.

(d) Make whole any employees whose earnings were decreased as a result of the unilateral changes plus interest as set forth in the remedy section of the decision.

(e) Provide the Union with all documents not already provided relating to its decision to eliminate the classifications of captains and bartenders and to transfer the work performed by employees in those classifications as set forth in the remedy section of the decision.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Lake Buena Vista, Florida, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms pro-

vided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 5, 2008.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the protective order entered during the hearing prohibiting the disclosure of certain exhibits be, and the same is, continued in full force and effect and that the exhibits submitted under seal will continue to be maintained under seal.

Dated, Washington, D.C. June 2, 2009

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT alter the scope of your recognized bargaining unit by eliminating the classifications of food and beverage captain (banquet captain), beverage captain (bar captain), and beverage host/hostess banquets (bartender) without the consent of the Union.

WE WILL NOT fail to bargain in good faith with United Food and Commercial Workers Union, Local 1625, as your exclusive collective-bargaining representative by unilaterally eliminating the unit classifications of food and beverage captain (banquet captain), beverage captain (bar captain), and beverage host/hostess banquets (bartender) and transferring the work performed by you who were in those classifications.

WE WILL NOT modify your terms and conditions of employment as set out in the collective-bargaining agreement without the agreement of the Union.

⁵ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a

Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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WE WILL NOT refuse to provide the Union with requested relevant information relating to our decisions regarding the foregoing unilateral changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the Board's order, restore the classifications of food and beverage captain (banquet captain), beverage captain (bar captain), and beverage host/hostess banquets (bartender).

WE WILL, within 14 days of the Board's order, rescind the unilateral changes and restore those of you who were removed from your classifications of food and beverage captain (banquet captain), beverage captain (bar captain), and beverage host/hostess banquets (bartender) to those classifications and restore the work transferred from those classifications to you.

WE WILL, within 14 days of the Board's order, rescind the unilateral modifications of the collective-bargaining agreement relating to your terms and conditions of employment.

WE WILL make whole any of you represented by the Union in our catering operation whose earnings were decreased as a result of the unilateral changes plus interest as set forth in the remedy section of the decision.

WE WILL provide the Union with all documents not already provided relating to our decision to eliminate the classifications of captains and bartenders and to transfer the work performed by employees in those classifications as set forth in the remedy section of the decision.

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